

EMERGENCY APPLICATION FOR 90-DAY STAY
OF EXECUTION AND RECONSIDERATION OF
CLEMENCY APPLICATION

on behalf of

KELLY RENEE GISSENDANER

ORIGINAL

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BEFORE THE BOARD OF PARDONS AND PAROLES
STATE OF GEORGIA

**EMERGENCY APPLICATION FOR 90-DAY STAY OF EXECUTION
AND RECONSIDERATION OF CLEMENCY APPLICATION**

Undersigned counsel applies to the Board of Pardons and Paroles for a reconsideration of the clemency application presented on February 24, 2015, and for a 90-day stay of her execution, presently scheduled for March 2, 2015, at 7:00 PM, to permit the Board to hear all necessary witnesses in support of her clemency application.

On February 24, 2015, this Board heard live testimony from many people who knew Kelly Gissendaner in support of her application for clemency. The witnesses offered testimony about Ms. Gissendaner's faith and profound remorse, her studies in theology, and her service to others both inside and outside the prison. What the Board did not hear, and what is necessary to ensure that the Board has a full understanding of the grounds supporting Ms. Gissendaner's application, is the testimony of many vital witnesses employed by the Georgia Department of Corrections

(DOC) who would have left no doubt that a grant of clemency is supported in this case.

The Board's executive clemency power is founded on considerations of the public good, and is to be exercised on the ground that the public welfare, which is the legitimate object of all punishment, will be as well promoted by a suspension as by an execution of the sentence. The information and testimony needed for this Board to exercise its powers in full was not available to the Board through no fault of the Board.

The Board did not hear this because we, the lawyers, were unable to bring it to you. There were many witnesses who did not come forward due to their role as DOC employees. Although DOC rules ostensibly say that employees are permitted to speak to counsel in capital clemency proceedings if desired, the reality of this rule is less than clear.

This is a unique situation, unlike other cases that come before this Board, and it warrants a unique response. There is more that you need to know before the State of Georgia takes Kelly Gissendaner's life. The information available is the same as what is

relied upon by the Board in all cases. O.C.G.A. sec. 42-9-43

provides, in pertinent part:

Information to be used by the board in considering cases....

(a) The board, in considering any case within its power, shall cause to be brought before it all pertinent information on the person in question. Included therein **shall** be:

(1) A report by the superintendent, **warden**, or jailer of the jail or state or county correctional institution in which the person has been confined upon the conduct of record of the person while in such jail or state or county correctional institution;

(2) The results of such physical and mental examinations as may have been made of the person;

(3) The extent to which the person appears to have responded to the efforts made to improve his or her social attitude;

(4) The industrial record of the person while confined, the nature of his or her occupations while so confined, and a recommendation as to the kind of work he or she is best fitted to perform and at which he or she is most likely to succeed when and if he or she is released;

(5) The educational programs in which the person has participated and the level of education which the person has attained based on standardized reading tests; and

(6) The written, oral, audiotaped, or videotaped testimony of the victim, the victim's family, or a witness having personal knowledge of the victim's personal characteristics.

(emphasis added).

Critical witness testimony missing

The most important witness from whom testimony was not heard is former warden, now Field Operations Manager, Kathy Seabolt. Ms. Seabolt was Kelly's warden for a total of six years, first at Metro State Prison and then at Lee Arrendale State Prison.

Following her tenure as warden in July 2014, Ms. Seabolt has continued to have regular contact with Kelly after being promoted to her current position overseeing all women's correctional facilities. It is rare within the prison system that a warden would have such a lengthy amount of time as warden over a given inmate. Ms. Seabolt is likely the best and highest ranking DOC employee to offer perspective on Ms. Gissendaner's behavior as an inmate and her rehabilitation.

In October 2011, Kelly was honored as one of two students chosen as commencement speakers at the graduation ceremony of the Certificate of Theological Studies Program. At that time, she met former Board Chair General James Donald, who attended the ceremony and also gave a speech. During his remarks, Gen. Donald looked around the room and said words to the effect that everyone in the room would someday "go home." He then paused,

looked directly at Kelly, and said something like "maybe not everybody," before pausing again and saying, "no, everybody is going home."

Everyone present at the ceremony heard these words, and as Gen. Donald was the Chair of the Board at that time, his words carried great weight. Shortly after the ceremony, Gen. Donald reached out to Warden Seabolt and asked that both she and Kelly submit a letter to the board on Kelly's behalf. Around that same time, Kelly was interviewed by a Board representative, though she was given no reason for the interview. The letter that Kelly submitted is the one that was included in her clemency application appendix. Undersigned counsel does not have a copy of the letter submitted by Ms. Seabolt.

Gen. Donald's comments at the graduation ceremony also were reported to other sitting board members, as was his promise to Ms. Gissendaner that she would receive clemency. Both before and after the presentation of the requested letters to the Board, the subject of Ms. Gissendaner and her inevitable clemency application came up in other conversations between the warden, Gen. Donald, and others. Each time Gen. Donald reiterated his statement that

Ms. Gissendaner did not need to worry about clemency as it was a foregone conclusion.

Ms. Seabolt provided a second letter to the Board in 2015.¹ It is our understanding that these letters provide a brief summary of Kelly's institutional history but by no means do they provide the detailed and critical history that would be within the knowledge of a warden who has supervised an inmate for six years. The present warden of Lee Arrendale, Kathleen Kennedy, has been responsible for Kelly's supervision for only six months, thus was not in a position to observe the model of rehabilitation that Kelly has become, Kelly's other accomplishments over the years, and the scope of her work with other inmates and students who visit her in various programs at the prison.

Ms. Seabolt is a necessary and critical witness who should be interviewed by the Board. We have no indication that Ms. Seabolt was contacted or that the letter she submitted was reviewed and given credence. As someone who has seen Kelly transformed over so many years, and who has personally supervised Kelly's day to

¹ Pursuant to the Board's policy, these letters are classified so Ms. Gissendaner has not been provided a copy.

day interaction with other inmates, she is uniquely qualified to offer evidence to this Board. It is imperative that she be heard.

Other DOC witnesses

Patty Daniel, an investigator at the Federal Defender Program working on Ms. Gissendaner's behalf, was the person charged with finding and interviewing witnesses who could provide information in support of Ms. Gissendaner's clemency application. Ms. Daniel interviewed many DOC employees and initially was told by them that they would be willing to provide written statements and testify. This position changed when they were informed by the warden at Lee Arrendale that they were not permitted to speak with anyone on behalf of Ms. Gissendaner. Ex. 1, Declaration of Patty Daniel.²

On January 29, 2015, the warden submitted a memo to all staff stating the following:

An execution date might be scheduledt (sic) in the immediate future for our inmate under death sentence. This action will likely bring a lot of publicity to LASP.

²



Be advised that if ANYONE calls you with questions regarding this issue, you are to refer them to the DOC Public Affairs office at 478-992-5252.

Under no circumstances are you to discuss this with people outside the institution. Staff should also be careful what is said to other inmates and personal feelings are to be suppressed.

If you have questions or concerns, please contact Warden Kennedy or Deputy Warden Tatum.

Ex. 1, Memorandum from Warden Kathleen Kennedy to All Staff, January 29, 2015 (emphasis added).

The chilling effect of this memo was immediate. Persons who had previously said that they would be willing to convey their support for Ms. Gissendaner's clemency application were no longer willing to talk. Ms. Daniel's declaration outlines her efforts to interview witnesses and the impact this memo had on their willingness to convey support for Kelly. Further, Ms. Daniel's efforts to identify additional DOC employees who could provide support for Ms. Gissendaner's application were halted by this memo.

One cannot overstate the damage that these events caused to Ms. Gissendaner's case for clemency. A key part of the state's

argument against clemency is the sincerity of Ms. Gissendaner's transformation and the extent to which she has truly changed.

Testimony from the people who observe Kelly every day and are in a position to provide information regarding the depth of her personal and spiritual conversion and rehabilitation is necessary to allow this board to have a full and accurate picture of Ms. Gissendaner. In order to allow the DOC witnesses to testify, this board should use its subpoena power to compel them to bring this relevant and necessary information before the board. Only then can the witnesses be free of the concerns that prohibited them from providing this information in the initial proceedings.

Inmate testimony

It was clear that we were all very moved by the testimony of Megan Chambers, who was a beautiful and shining DOC success story of what can happen through redemption and rehabilitation. Ms. Chambers poignantly described that the origin of the spark that started her process of change was Kelly. Ms. Chambers was spurred to finally value her life and find a way to forward by changing her behavior and entering DOC programs that provided

real knowledge of skills for her life that was to come outside the prison. Her success is inspiring.

We hope that it was similarly clear, however, that Kelly is the same kind of beautiful and shining success story, also taking full advantage of programs available to her, albeit in a different context because she will never be released from prison. We also hope that it is clear that Kelly, through redemption and rehabilitation, has gained insight that allows her to bring needed support and assistance to others who are struggling both in and out of prison. What Kelly has learned, and the life she now leads, surely has tremendous power and merit as the testimony so powerfully demonstrates.

Since our presentation last week, we have heard from other inmates who could have shared similar stories, including Nikki Roberts, whose videotaped statement is attached. Ex. 2. There appear to be dozens, if not hundreds, of other former inmates for whom Kelly made a deep and lasting impact.

Relative culpability

We also want to further emphasize the different and distinct nature of Kelly's criminal conduct. She fully accepts responsibility

for what she did, but her criminal culpability obviously differs significantly from that of her co-defendant, Greg Owen. How many times along the way did Owen have to make a choice to continue doing what he did? According to the State's theory, Ms. Gissendaner dropped Owen off at her home – alone – to await Mr. Gissendaner's return. He was not expected to return for several hours. At any point during that time, Owen could have left the house and gone elsewhere. He could have abandoned his efforts to kidnap Mr. Gissendaner at knifepoint, direct him to get into his car and drive many miles, past numerous public places, and walk him uphill some 300-500 feet to a secluded area in the woods in the dead of night. Owen could have stopped what he was doing before he stabbed Mr. Gissendaner to death.

Owen chose instead, unbeknownst to Ms. Gissendaner, to recruit an accomplice to assist in the murder. Owen and his accomplice had many choices to make on February 7, 1997 over the course of the hours, minutes, and seconds they spent waiting for Mr. Gissendaner until the time he was killed. Owen and his accomplice made those choices, not Kelly. They were the last people who could have done something differently at many points

that night to change the tragic history that unfolded. The accomplice's identity remains unknown; he has never been punished for his role in this terrible crime. In saying this, we do not diminish Kelly's involvement: she is criminally culpable and fully accepts responsibility, but it is important to distinguish her role from that of Owen and his accomplice, neither of whom will die for their roles.

In addition, during State habeas corpus proceedings, Owen acknowledged that key aspects of his testimony were false in three material respects: 1) Kelly did not give him the murder weapon (the knife); 2) Owen elicited and obtained assistance from an accomplice unbeknownst to Kelly; and 3) Kelly never went to the actual murder scene in the woods to view her husband's body to ensure that he was dead. These falsehoods are especially significant in evaluating the relative culpability of each person involved in Mr. Gissendaner's death.

And finally, it bears repeating that Ms. Gissendaner and Mr. Owen both were offered a sentence of life imprisonment, with a contract not to seek parole for 25 years. At one time, therefore, all the parties involved in the case thought that a sentence less than

death was appropriate for Ms. Gissendaner.

Past clemency decisions

This Board has granted relief in nine cases in the modern era of the death penalty. Not only does Ms. Gissendaner's case for clemency bear similarities to many of these cases, Ms. Gissendaner has presented evidence on more than one of the issues the Board relies on in evaluating these cases. As clemency is an exercise of mercy and the reasons for the grant in any case are nuanced and varied, the precise reasons for grants in any particular case are not published. That said, a review of the clemency applications, information made available after the grants by those attending the hearings, and newspaper articles outlining the cases, provides relevant information.

- Charles Harris Hill (1977 - Hill's sentence was disproportionate to the sentence of his co-defendant who was the actual killer and got life)³;
- Freddie Davis (1988- Davis's death sentence was disproportionate to the life sentence given to his equally or more culpable co-defendant);

³ Although Hill was not the actual killer, the evidence showed that Hill broke down the door to the victim's home, and then beat and stabbed the victim. His co-defendant was responsible for the fatal stab wound.

- **William Moore (1990 – Moore had a good prison record, exhibited remorse in prison, had a religious conversion while in prison, and had three nieces of the victim who supported clemency);**
- **Harold Williams (1991 – Williams' death sentence was disproportionate to that of his accomplice who took full responsibility);**
- **Alexander Williams (2002 – Williams was mentally ill and seventeen years old at the time of the crime⁴);**
- **Willie James Hall (2004 – six jurors reported they would have supported a sentence of life without parole had that option been available at trial, the district attorney did not oppose the grant, Hall had a good prison record and Hall did not have a prior criminal history);**
- **Samuel David Crowe (2008 – testimony from friends, pastors and one former corrections officer emphasizing his good behavior, deep remorse, and service to others while on death row);**
- **Daniel Greene (2012 - testimony from the former assistant district attorney that Greene did not fit the District Attorney's criteria for someone who deserved the death penalty and that he believed a sentence of life without parole was appropriate, testimony from community members and prison officials that the crime was an outlier of his otherwise peaceful and upstanding life and that Greene was intoxicated at the time of the crime.); and**
- **Tommy Waldrip (2014 – sentence was disproportionate to more culpable co-defendants, Waldrip was arguably not the**

'The victim's mother in Mr. Williams's case strongly opposed clemency.

person who actually killed the victim⁵, good prison record, good work before prison, helpful to other prisoners).

There is no meaningful distinction between Kelly Gissendaner's plea for clemency and those detailed above. If anything, Ms. Gissendaner's grounds are more compelling than those resulting in previous clemency grants. Her remorse is well documented and real. The proportionality of her sentence of death to her co-defendant, who committed the actual murder, is a key point in her application and is a ground upon which this Board has granted clemency in several cases. In fact, this Board has on at least four occasions in the past commuted a death sentence of a co-defendant who was not the actual killer of the victim. See Charles Harris Hill (1977); Freddie Davis (1988); Harold Glenn Williams (1991); and Tommy Waldrip (2014). Ms. Gissendaner asks that this Board, as it has in the past, extend mercy to the person who did not commit the actual murder.⁶

⁵ Waldrip initially took responsibility for the actual killing of the victim but later gave inconsistent testimony regarding his role in the murder.

⁶ As was detailed in her clemency application, both Kelly and her co-defendant were offered pleas of life with the possibility of parole after twenty five years. Greg accepted and Kelly did not, primarily due to the advice of her attorney.

Ms. Gissendaner's positive influence on other inmates and outreach to troubled youth was the subject of much discussion during the clemency hearing. These facts provide strong support for a grant of clemency in this case as similar facts provided support for clemency in the cases above.

Finally, the voices of the children who were victims and have been harmed the most by this tragic crime should be heard.

Kelly and Doug Gissendaner's children

Kayla and Dakota are victims of this crime and their opinions should weigh heavily in the Board's decision making.⁷ Both children want you to know with certainty that they fully believe that their father would not want their mother to die because of what she did. Please look at what you know of how Douglas Gissendaner lived his life, and the kind and gentle person he was, and wonder what result he would want for the children he loved so deeply.

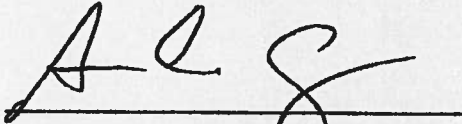
⁷ We understand that Douglas Gissendaner's parents and sisters want Kelly to die. We can only imagine the depths of their grief over their beloved family member's murder. Doug's children want what we all want for the extended Gissendaner family: some measure of healing, some measure of peace. We understand that neither will fully happen because a loss like this will always be a source of great pain. And we also believe that Kelly's death will not restore them or make them whole.

These remarkable children have made the very real choice to “reject anger and bitterness” and embrace “love and forgiveness.” Isn’t this the message that we want to endorse, as individuals and as a society, and for this family? “The wolf also shall dwell with the lamb, and the leopard shall lie down with the kid; and the calf and the young lion and the fatling together; and a little child shall lead them.” Isaiah 11:6. And in Jesus’s own words: “Let the little children come to me, and do not hinder them, for the kingdom of heaven belongs to such as these.” Matthew 19:14. *Let these children lead us.* Let them spread this message of love, forgiveness, and redemption far and wide. That is the lesson in this case. That is the call for mercy that should not be cast aside.

Conclusion

For all the reasons discussed above, and for the reasons found in the evidence and argument presented at the hearing on this Application, Ms. Gissendaner asks this Board to grant a stay of execution for ninety (90) days to permit the Board to subpoena the DOC employees, including Ms. Seabolt, who can provide necessary information in this case; review and deliberate on the new evidence on Ms. Gissendaner’s behalf; and, thereafter, exercise its power to

bestow mercy and commute Ms. Gissendaner's death sentence to a sentence of life without the possibility of parole. This case cries out for the mercy power of this Board.



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